

E-FILED on 12/6/12

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
ERNESTO NOGUESDA-PINO,  
  
Defendant.

No. CR-11-00704 RMW

**ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS PURSUANT TO  
THE FIFTH AMENDMENT DUE  
PROCESS RIGHT AND SIXTH  
AMENDMENT SPEEDY TRIAL RIGHT**

**[Re Docket No. 17]**

Defendant Nogueta-Pino moves to dismiss the indictment for the alleged violation of his due process and speedy trial rights. He bases his motion on the alleged violation of his Fifth and Sixth Amendment rights. The court has read the moving and responding papers and heard the argument of counsel. The court denies the motion.

**I. Background**

A chronology of the critical procedural events of this case is:

**August 24, 2009:** Nogueta, an alleged alien, arrested and taken into custody in Santa Clara County for child molestation offenses

**August 26, 2009:** State criminal charges instituted

**September 16, 2009:** Nogueta convicted of four counts of lewd and lascivious acts on a child under the age of 14

**October 5, 2009:** Immigration Enforcement Agent interrogates Nogueta about his alienage and illegal status

**May 5, 2010:** Nogueta sentenced to 32 years in State prison; custody thereafter transferred to California Department of Corrections

**August 30, 2011:** United States attorney files criminal complaint charging Nogueta with a violation of 8 U.S.C. § 1326 (illegal reentry following deportation)

**September 28, 2011:** Nogueta indicted in the Northern District of California for violating 8 U.S.C. § 1326 (illegal reentry following deportation)

**September 20, 2012:** Writ of habeas corpus ad prosequendum issued to bring Nogueta to federal court

**October 25, 2012:** Nogueta makes first appearance in federal court

**January 22, 2013:** Trial date

## II. Analysis

Nogueta asserts that the delay between August 24, 2009, the date defendant treats as the date on which defendant committed his illegal re-entry offense, and September 28, 2011, the date of his indictment, was excessive and entitles him to dismissal of the indictment.

In *United States v. Martinez*, 77 F.3d 332 (9th Cir. 1996), the court recognized in reversing a dismissal for pre-indictment delay that a defendant has a heavy burden to show prejudice before an indictment may be dismissed for pre-indictment delay.

On a motion to dismiss an indictment for preindictment delay, the district court cannot balance the reasons for delay against prejudice, until first deciding that prejudice has been sufficiently proved. The task of establishing the requisite prejudice for a possible due process violation is "so heavy" that we have found only two cases since 1975 in which any circuit has upheld a due process claim. . . . The statute of limitations, not the due process clause, is generally the protection against preindictment delay. The defendant's proof of "actual prejudice" must be "definite and not speculative." Even if there is prejudice, it must, when balanced against the government's reasons for delay, offend those fundamental conceptions of justice which lie at the base of our civil and political institutions.

*Id.* at 335 (internal citations and quotation marks omitted).

Here, defendant has not shown any actual prejudice and it is difficult to speculate how he could have been prejudiced. Further, the indictment was returned well within the five-year statute of limitations. *See* 18 U.S.C. § 3282.

1 For the reasons stated, the court denies defendant's motion to dismiss the indictment for pre-  
2 indictment delay.

3 **A. Post-Indictment Delay**

4 Nogueda asserts that the delay from September 28, 2011, the date of his indictment, to the  
5 present has been excessive and entitles him to dismissal of the indictment. The defendant is  
6 particularly critical of the United States Attorney's Office in San Jose because it failed to promptly  
7 file a detainer or obtain defendant's appearance in federal court in accordance with 18 U.S.C.  
8 § 3161(j)(1), which provides:

9 If the attorney for the Government knows that a person charged with an  
10 offense is serving a term of imprisonment in any penal institution, he shall---

(A) undertake to obtain the presence of the prisoner for trial; or

11 (B) cause a detainer to be filed with the person having custody of the prisoner  
12 and request him to so advise the prisoner and to advise the prisoner of his right to  
13 demand trial.

14 Courts have found that a four factor analysis is appropriate in determining whether a case  
15 should be dismissed for post-indictment delay: (1) whether delay before trial was uncommonly long,  
16 (2) whether the government or the defendant is more to blame for that delay, (3) whether, in due  
17 course, the defendant asserted his right to a speedy trial, and (4) whether the defendant suffered  
18 prejudice as a result of the delay. *Doggett v. United States*, 505 U.S. 647, 651 (1992). The first  
19 factor involves a double inquiry. Simply to trigger a speedy trial analysis, a defendant must show a  
20 threshold amount of delay. *Id.* at 651-52. "If the accused makes this showing, the court must then  
21 consider, as one factor among several, the extent to which the delay stretches beyond the bare  
22 minimum needed to trigger judicial examination of the claim. . . . the presumption that pretrial delay  
23 has prejudiced the accused intensifies over time." *Id.* Courts generally have found that delays  
24 approaching one year meet the threshold and are presumptively prejudicial. *See, e.g., United States*  
25 *v. Gregory*, 322 F.3d 1157, 1161-62 (2003). Where the delay is not significantly greater than the  
26 threshold and the government's blameworthiness was not unusually great, the defendant then must  
27 present evidence of actual prejudice. *See United States v. Gonzalez-Avina*, No. 06-00004, 2006 WL  
28 618644, \*2 (N.D. Cal. Mar. 10, 2006).

1 In the present case, the delay is not significantly greater than the threshold. However, since  
2 the threshold has been met and prejudice is presumed and the other two factors weigh in defendant's  
3 favor, the defense contends the indictment should be dismissed. Defendant asked for a speedy trial  
4 from the date he was first brought to federal court.

5 Defendant asserts that the U.S. Attorney's office deliberate failure to timely comply with its  
6 obligations under 18 U.S.C. § 3161(j)(1) in illegal immigration cases supports dismissal of the  
7 indictment. Although it seems fair to consider the failure in evaluating the Government's degree of  
8 culpability in causing the delay, dismissal is not a remedy for a violation of § 3161(j)(1). *See United*  
9 *States v. Valentine*, 783 F.2d. 1413, 1415 (9th Cir. 1986); *United States v. Lualeмага*, 280 F.3d  
10 1260, 1264 (9th Cir. 2002). The remedy, if needed, is a disciplinary or monetary sanction. *See*  
11 *Valentine*, 783 F.2d at 1416.

12 The court finds that in balancing the factors to be considered in deciding whether to dismiss  
13 the indictment that defendant has met the threshold of delay sufficient to raise a presumption of  
14 prejudice, that the delay is attributable to the Government, and that the defendant demanded a  
15 speedy trial as soon as he learned of the indictment. The government's delay was intentional in the  
16 sense that the San Jose Branch of the U.S. Attorney's office apparently had a policy of not  
17 complying with 18 U.S.C. § 3161(j)(1) in cases where charged illegal re-entry defendants were  
18 serving state sentences. However, the Government did not choose to ignore its obligations in bad  
19 faith or for the specific purpose of penalizing Noguera by impairing his ability to present a defense.

20 The court finds that since defendant has met the threshold for showing prejudice, the  
21 question of whether defendant has suffered actual prejudice is critical. *See Gregory*, 322 F.3d at  
22 1162-63; *Gonzalez-Avina*, 2006 WL 618644, \*2. Three types of actual prejudice are generally  
23 considered: oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility  
24 that the accused's defense will be impaired. *Gregory*, 322 F.3d at 1163. Defendant has not shown  
25 that he has suffered any type of actual prejudice. He has been incarcerated in a state facility on a  
26 lengthy state sentence. It seems speculative that he will end up serving more total time as a result of  
27 the delay in bringing the federal charges and any concern in that regard can be addressed at  
28 sentencing, if he is convicted. *See id.*; *Gonzalez-Avina*, 2006 WL 618644, \*5.

The court's conclusion that dismissal is not appropriate is confirmed by looking at the results of Supreme Court, Ninth Circuit and Northern District cases discussing the question of whether an indictment should be dismissed for excessive post-indictment delay. The facts of the instant case are more analogous with the cases where dismissal has not been found appropriate. A sampling of such cases follows:

Case	Length of Delay	Result
<i>Doggett v. United States</i> , 505 U.S. 647 (1992)	8½ years	Conviction reversed. 6th Amendment speedy trial violation
<i>United States v. Beamon</i> , 992 F.2d 1009 (9th Cir. 2003)	17 months; 20 months (two defendants)	Convictions affirmed. No speedy trial violation
<i>United States v. Gregory</i> , 322 F.3d 1157 (9th Cir. 2003)	22 months	Dismissal reversed. No 6th Amendment speedy trial violation
<i>United States v. Mendoza</i> , 530 F.3d 758 (9th Cir.)	10 years	Conviction reversed. 6th Amendment speedy trial violation
<i>United States v. Liersch</i> , 2006 WL 6469421 (S.D. Cal. June 26, 2006)	26 months	Motion to dismiss for 6th Amendment speedy trial violation denied
<i>United States v. Gonzalez-Avina</i> , 2006 WL 618644 (N.D. Cal. Mar. 10, 2006)	20 months	Motion to dismiss for 6th Amendment speedy trial violation denied

For the reasons discussed, defendant's motion to dismiss based upon post-indictment delay is denied.

DATED: December 6, 2012

  
 RONALD M. WHYTE  
 United States District Judge